

## **Silva Scher (Migration) [2020] AATA 5028 (9 September 2020)**

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### **DECISION RECORD**

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| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <b>APPLICANTS:</b>        | Mr Paulo Henrique Silva Scher<br>Mrs Ana Claudia Santos De Oliveira Scher                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>CASE NUMBER:</b>       | 1831021                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>DIBP REFERENCE(S):</b> | BCC2018/3922274                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>MEMBER:</b>            | Peter Haag                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>DATE:</b>              | 9 September 2020                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>PLACE OF DECISION:</b> | Melbourne                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>DECISION:</b>          | <p>The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 500 (Student) visa:</p> <ul style="list-style-type: none"><li>• Public Interest Criterion 4020 for the purposes of cl.500.217(1) of Schedule 2 to the Regulations; and</li><li>• the direction that the application of the second named applicant for a Student (Temporary) (Class TU) visa be reconsidered.</li><li>•</li></ul> |

Statement made on 09 September 2020 at 8:12pm

### **CATCHWORDS**

*MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – offer of employment signed by a previous manager – employer’s dispute with the signatory – employer revised its validation of employment offer – decision under review remitted*

### **LEGISLATION**

*Migration Act 1958, ss 5(1), 65*

*Migration Regulations 1994, Schedule 2 cl 500.217; Schedule 4 Public Interest Criterion 4020*

## **CASES**

*Arora v MIBP [2016] FCAFC 35*

*Batra v MIAC [2013] FCA 274*

*Trivedi v MIBP [2014] FCAFC 42*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 October 2018 to refuse to grant the applicants Student (Temporary) (Class TU) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 25 June 2018. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant meets Public Interest Criteria (PIC) 4020(1) and the requirements of cl.500.217 of Schedule 2 to the Regulations. Further, the delegate was not satisfied waiver of the requirements of PIC 4020 was justified.
6. The applicants appeared before the Tribunal on 4 September 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant.
7. The applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
  - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
  - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
  - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
  - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

**Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?**

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. According to the delegate's decision, a copy of which the applicant provided to the Tribunal in this review, the applicant failed to meet the requirements of PIC 4020, a mandatory requirement for the grant of a Student visa, because he provided a bogus document to the Department as part of his application for the visa.
15. The issue for determination in the review is:
  - whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:
    - a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that:
      - purports to have been, but was not, issued in respect of the person, or
      - is counterfeit or has been altered by a person who does not have authority to do so, or
      - was obtained because of a false or misleading statement, whether or not made knowingly.
16. in relation to the visa application.
17. In assessing the application for a Student visa, on 7 August 2018 a Departmental official spoke to a person said to occupy the position of Manager at Enron Construcões Me (Enron) Brazil, for the purpose of authenticating a document dated 18 June 2018 purporting to be an offer of employment by Enron to the applicant. The document bore a signature purporting to be the signature of Mr Joneci B. de Souza, who occupied the position of Administrative Director of Enron. The Departmental official was told by his informant at Enron that he had never heard of the applicant and that Mr de Souza was never employed in the position of Administrative Director.

18. The Departmental official was also informed by the person he understood to be Enron's Manager, that Mr de Souza is a former employee of the company, but that he had not worked at the company for the past 90 days. That information was significant for the obvious reason that it indicated Mr de Souza did not sign the document on behalf of the company. Nevertheless, the information obtained by the Departmental official indicated that Mr de Souza was a real person and that he was a relative recent employee of Enron. The Department official did not speak to Mr de Souza or take specific steps to authenticate the signature said to be that of Mr de Souza.
19. During the conversation with the Departmental official, the official mentioned Australia. And according to the information provided to the Department, that information compelled the Manager, during the telephone discussion with the official, to telephone his son in Australia, inferentially, to inquire into the provenance of the impugned document. In the opinion of the Tribunal, the apparent purpose and the timing of the phone call the Manager made to his son, who was studying English in Australia, is significant. It indicates the Manager apprehended the document may have been authorised by his son, and that his son was authorised to act on behalf of Enron in respect of the matters stated in the impugned document.
20. The Manager, in the context of speaking to his son in Australia, and because of the new information he received from him, revised what he had told the Departmental official, and said the document was authentic, and in effect, Enron stood by it. The denial of the document followed in the same telephone conversation by the declaration that the document was authentic, cast doubt on the authenticity of the impugned document, according to the delegate's reasons for decision. On another view of those events, the Manager's son in Australia, a part owner of Enron, did not give his father prior notice of the document or Enron's offer to employ the applicant that is stated in it. Consequently, the authenticity of the document was disputed, up to when the Manager spoke to his son in Australia and learnt from him that the document was his document and genuine.
21. The information that Mr de Souza had not worked at the company for 90 days and that he never occupied the position of Administrative Director of Enron requires examination. There is evidence before the Tribunal that at the time the integrity inquiries were made, the owners of Enron were embroiled in an acrimonious dispute with Mr de Souza and that his employment had been terminated.
22. On the whole of the evidence, it is reasonable to infer that the Manager denied Mr de Souza his role and employment history at Enron because of the unresolved employer/employee dispute between Enron and Mr de Souza. Be that as it may, there is now compelling documentary evidence before the Tribunal that the person who answered the phone at Enron was the father of one of the owners of Enron, and that he spoke to his son in Australia during the telephone conversation with the investigating Departmental official; and, that his son verified that the document is a genuine Enron document.
23. The delegate in her reasons for decision placed significant weight on her interpretation of the contents of the document. It would appear from her decision that she construed the document as an offer to employ the applicant to work as an engineer. On this view of the meaning of the document, there was reason to regard the document as a bogus document because the applicant's course of study in Australia would not qualify him to work in Brazil as an engineer. The Tribunal has formed a different view of this aspect of the document.
24. As the Tribunal understands the document, the title of the position offered to the applicant is Engineering Associate, as distinct from a position in which he would work for Enron as an engineer. The job description indicates the role would require the applicant to work

predominately in customer relations in Brazil and internationally, rather than work as an engineer.

25. On balance, after considering all the evidence, the Tribunal is left concerned that the delegate's conclusion that the impugned Enron document is bogus may derive from a failure of communication between the part-owner of Enron, who was the person who made the offer of employment to the applicant that is reflected in the impugned document, and left it to Mr de Souza to sign the document and bring it into the records of Enron in Brazil. And additionally, the Tribunal is concerned that the owner's father, the Enron manager who took the telephone call from the investigating Departmental official, may have misstated the facts about Mr de Souza's employment history at Enron because he did not initially accept the unexpected telephone inquiry at face value, and he misstated material facts about Mr de Souza's employment history at Enron because he harboured feelings of hostility towards Mr de Souza, a former employee with whom Enron was embroiled in an acrimonious employer/employee dispute.
26. After considering the whole of the evidence, on balance, the Tribunal is not satisfied the evidence before the Minister is evidence that the impugned document reflects the requisite purposeful falsity that constitutes a bogus document as defined in s.5(1) of the Act.
27. Therefore, the applicant meets PIC 4020(1).
28. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.500.217(1).

## **DECISION**

29. The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 500 (Student) visa:
  - Public Interest Criterion 4020 for the purposes of cl.500.217(1) of Schedule 2 to the Regulations; and
  - the direction that the application of the second named applicant for a Student (Temporary) (Class TU) visa be reconsidered.

Peter Haag  
Member

## ATTACHMENT

### Migration Regulations 1994

#### Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
  - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
  - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
  - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
  - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

## ***Migration Act 1958***

### **s.5 Interpretation**

(1) In this Act, unless contrary intention appears:

...

***bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...